**OPEN MEETINGS ACT, AN UPDATED PRIMER**

[5 ILCS 120/1 *et seq.*]

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**Introduction**

The Open Meetings Act, 5 ILCS 120, was enacted to protect the citizens’ right to know the actions and reasoning of public body decisions. The people have a right to be informed as to the conduct of a public body, since the purpose of a public body is to assist the people. Therefore, the statute fosters open meetings and is to be strictly construed against closed meetings. The statute reads “In order that the people shall be informed, the General Assembly finds and declares that **it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.”** 5 ILCS 120/1.

Although the best known features of the Act may pertain to “closed sessions,” in fact the Act is likely to be far more important to local governments because it is the primary source of the rules and requirements for *all* meetings, notifications, and manner of conducting them. Therefore the Open Meetings Act is pervasive in its impact and critical to follow, even where a public body seldom or never goes into closed session.

This article, in the nature of an overview or primer on the topic, outlines the Act in a practical manner instead of following its codified order. It begins with applicability, continues to the specific procedural requirements, discusses the closed session procedures, clarifies record keeping requirements, describes the procedures for public participation at open meetings, explains the required training for members of public bodies, discusses the role of the public access counselor within the Illinois Attorney General’s office and ends with the possible effects of non-compliance.

1. **DOES THE ACT APPLY TO YOUR PUBLIC BODY OR YOUR PARTICULAR MEETING?**

Section 2a of the Act states “All *meetings* of *public bodies* shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a.” 5 ILCS 120/2(a) (emphasis added). In regards to applicability, the key words in that provision are “meetings” and “public bodies,” because without a meeting or a public body, the Act does not apply. Thus, before diving into the procedural requirements, we must first consider whether the Open Meetings Act applies to a particular entity and for a specific occasion.

**1. What Qualifies as a Public Body and What Does Not?**

The Open Meetings Act contains a broad definition of “public body,” but there are some notable exclusions that include entities typically considered to be a public body. Section 1.02 of the Act defines a “public body:”

“Public body” includes all legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof. “Public body” includes tourism boards and convention or civic center boards located in counties that are contiguous to the Mississippi River with populations of more than 250,000 but less than 300,000. "Public body" includes the Health Facilities Planning Board. “Public body” does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act or an ethics commission acting under the State Officials and Employees Ethics Act, a regional youth advisory board or the Statewide Youth Advisory Board established under the Department of Children and Family Services Statewide Youth Advisory Board Act, or the Illinois Independent Tax Tribunal.

The beginning of the “public body” definition appears all-encompassing, including governmental bodies of an executive, legislative, administrative or advisory nature, or an ancillary of those entities, which expends tax revenue or is supported fully or partially by tax revenue, but it does not include all governmental bodies. The General Assembly and commissions or committees thereof are excluded from the Act. In order to clarify or ensure applicability, Section 1.02 explicitly lists some particular entities to be included or excluded under the Act.

So, how does the broad definition apply to those not specifically enumerated within the list itself? Obviously School Boards, City Councils, Village Boards, Library Boards, and other governing bodies of local governmental units, as well as committees and subcommittees composed by the Boards and made up of their members, fall under the statute’s general language.

But the question becomes more difficult with those organizations that do not directly control a governmental entity and are merely a subsidiary body. In order to resolve this dilemma, the courts have constructed a number of factors to consider: who appointed the members of the entity, the procedure for their appointment, the compensation for their duties, the assigned duties in the by-laws or authorizing statute, resolution or ordinance; whether it is an advisory or investigative unit; whether it is controlled by the government or any other public body; the body’s budget; its role within the larger organization; and the impact of its actions.

Clearly NOT subject to the Act are meetings of public body employees to discuss how to enhance their own performance in their jobs, even if the groups are referred to as committees. Additionally, private entities receiving a majority of their revenue from the public and conducting business primarily with governmental entities are not subsidiary bodies falling under the Act. Even if a public body appoints the members of an organization, so long as the public body does not exert control over the group, they will likely not be considered a subsidiary body.

Simply referring to a group of individuals as a “board,” “bureau,” or “committee” does not qualify it as a “public body.” Similarly, the mere labeling of a group as an “entity” does not exempt it from the Act’s application. Therefore, all of the aforementioned factors must be considered when deciding whether the Open Meetings Act applies to a “body” and it is always best to err on the side of caution.

**2. What Constitutes a Meeting?**

A “meeting” is “any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging,) or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business …” (Section 1.02)

A meeting, according to the Act, can be a collection of individuals grouped together in close proximity for a specific purpose; but it can also be a gathering of individuals who are miles apart. A meeting can include real time contemporaneous interactive communication, but it can also include communications by emails if the emails involve a sufficient number of people (a majority of a quorum), the discussion of public business, and responses back and forth that take place relatively quickly between the parties. Unfortunately, the definition does not provide a specific guideline for time between responses other than its use of the word “contemporaneous.” Therefore, to ascertain a time frame, we turn to “interactive communication” which is most closely associated with a conversation.

In the case of other electronic communication (i.e. telephone conferences, or “chat” sessions), the rate of communication is comparable to the speed of a normal conversation (which may include reasonable pauses). As a result, those communications are certain to be considered a gathering.

Emailing, on the other hand, is more of a gray area. The critical problem for email is that it could be determined to be subject to the Act if the responses come quickly to a majority of the quorum. Therefore, the sender may not have intended a meeting, but the email chain may become a meeting by the way others respond. Of course, by then it is too late to comply with the notice, agenda, and minutes requirements and the public body finds itself in violation of the Act. Therefore in order to avoid having a “meeting” by emails (whether unintended or not) the best practice is to include a warning note on any email sent, to warn the recipients NOT to reply, or certainly not to use the “reply all” feature of most email to avoid a potential violation of the Act.[[1]](#footnote-1)

After establishing that there is a public body gathering, then we must determine whether there is a quorum present and whether the purpose of the gathering is to discuss public business.

A quorum is usually a majority of the members of a body unless defined differently by applicable law or by-laws. A majority of a quorum would be the next whole number over half of a quorum. For example, if there is a body consisting of nine members, then a quorum of nine is five and so a majority of a quorum is three. Therefore if three members were to “gather” then they could be considered as “meeting” for purposes of the Act. It is also wise to be cautious when a committee of a board meets, because the majority of the quorum only applies to that committee. So if it is a thirteen member board with a six member committee, then a meeting of only three members of the committee not four would be required for a majority of a quorum of that committee. There is an exception, however, for 5 member public bodies. In the case of 5 member public bodies a minimum three members must be present to constitute a meeting. Additionally, three affirmative votes are required for adoption of motions, resolutions or ordinances in a 5 member public body.

**3. Electronic Attendance or Members Attending Remotely.**

One would assume that if you can violate the Open Meetings Act by having an unsanctioned meeting through the use of the internet or the telephone, that a meeting could properly take place with members attending the meeting remotely; you would, however, likely be incorrect. The Open Meetings Act specifically addresses Electronic Attendance and has specific rules for attending meetings remotely.First, members of the public body may only attend a meeting remotely if one of three bona fide reasons applies: 1. Personal illness or disability; 2. Employment purposes or to conduct business of the public body; or 3. A family or other emergency situation. (Note that a family vacation is not covered under the exceptions.) Furthermore, if a member is attending remotely, an actual PHYSICAL presence of a quorum must be present at the physical meeting site for a meeting to take place. If a quorum is physically present and the member attending remotely falls into one of the three exceptions listed above, the missing member may participate in the meeting by telephone, video or audio conference or electronic chat **if** such attendance is permitted by the rules of the public body. In other words, the public body **may**, but is not required by the Act, to permit remote attendance. The member attending remotely may, under the Act and if permitted by the public body’s rules also vote.

Of special note, the electronic attendance section of the Act, in particular the requirement of a quorum in one physical location, does not apply the same rules to public bodies with state-wide jurisdiction and library systems of a geographic area of more than 4,500 square miles.

The formality or social environment of a meeting is inconsequential. It is more important what is discussed rather than where it is discussed. Meetings at a restaurant, a member’s home, or over the phone, have all constituted public meetings where a quorum was physically present and public business was discussed, assuming the requirement that the location be “open and convenient” is satisfactorily met. The Attorney General has criticized various meeting locations in private homes or private offices or remote locations distant from the boundaries of the public body as not complying with the “open and convenient” requirement. In 1967, the General Assembly removed the term “official” before “meetings” to possibly include even informal gatherings, if public business is discussed.

**B. THE NOTICES AND PROCEDURAL REQUIREMENTS REQUIRED BY THE OPEN MEETINGS ACT.**

Once it has been determined that the Act applies to a particular entity and situation, then the procedural requirements dictated by the Act must be followed. Sections 2.02-2.03 contain the formalities that must be followed including scheduling, posting agendas, and providing public notice on websites, newspapers, and at the principal office or meeting place of the public body. The legislature recently changed the requirements to make the agenda more detailed and those newer requirements, effective as of January 1st of 2013, are in section 2.02(c), underlined below (and bolding in 2.02(a) is mine).

§ 2.02. Public notice of all meetings, whether open or closed to the public, shall be given as follows:

(a) Every public body shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. **An agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting.**  **A public body that has a website that the full-time** **staff of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body.** Any agenda of a regular meeting that is posted on a public body’s website shall remain posted on the website until the regular meeting is concluded. The requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda. Public notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting, but the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda. The requirement of public notice of reconvened meetings does not apply to any case where the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. Notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.

(b) Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held. In addition, a public body that has a website that the full-time staff of the public body maintains shall post notice on its website of all meetings of the governing body of the public body. Any notice of an annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved. Any notice of a regular meeting that is posted on a public body’s website shall remain posted on the website until the regular meeting is concluded. The body shall supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meeting, to any news medium that has filed an annual request for such notice. Any such news medium shall also be given the same notice of all special, emergency, rescheduled or reconvened meetings in the same manner as is given to members of the body provided such news medium has given the public body an address or telephone number within the territorial jurisdiction of the public body at which such notice may be given. The failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting.

(c). Any agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting. The public body conducting a public meeting shall ensure that at least one copy of any requested notice and agenda for the meeting is continuously available for public review during the entire 48-hour period preceding the meeting. Posting of the notice and agenda on a website that is maintained by the public body satisfies the requirement for continuous posting under this subsection (c). If a notice or agenda is not continuously available for the full 48 hour period due to actions outside of the control of the public body, then that lack of availability does not invalidate any meeting or action taken at a meeting.

§ 2.03. Schedule of Meetings. In addition to the notice required by Section 2.02, each body subject to this Act must, at the beginning of each calendar or fiscal year, prepare and make available a schedule of all its regular meetings for such calendar or fiscal year, listing the times and places of such meetings.

If a change is made in regular meeting dates, at least 10 days’ notice of such change shall be given by publication in a newspaper of general circulation in the area in which such body functions. However, in the case of bodies of local governmental units with a population of less than 500 in which no newspaper is published, such 10 days’ notice may be given by posting a notice of such change in at least 3 prominent places within the governmental unit. Notice of such change shall also be posted at the principal office of the public body or, if no such office exists, at the building in which the meeting is to be held. Notice of such change shall also be supplied to those news media which have filed an annual request for notice as provided in paragraph (b) of Section 2.02.

As the Act states, notice must be provided for all meetings of the public body, whether they are open or closed. Notice of the schedules of regular meetings for a calendar or fiscal year including the dates, times, and places of all regularly scheduled meetings must be provided. Notice must be posted at the principal office of the public body, where the meeting will be held, and on the public body’s website. The degree of notice required depends upon the type of meeting: regular, special, reconvened, or emergency (discussed below). In all circumstances, the Agenda posted must set forth the “general subject matter” of any resolution or ordinance that will be the subject of ‘final action’ at the meeting.

**1. Types of Meetings**

**a. Regular Meetings.** For regular meetings, a public body must post an agenda for the meeting at the main office of the public body, and post an agenda at the location of the meeting at least 48 hours before the meeting begins and that agenda needs to be continuously available for those 48 hours. If the public body has a website maintained by a full time employee, (as distinct from a contractor, vendor or part-time employee) the agenda must be posted there as well (though failure to do so does not invalidate the meeting or action taken). The agenda must be detailed enough so that the general subject matter that will be the subject of any final action at the meeting can be discerned.

**b. Special Meetings.** When a meeting occurs outside of the regular meeting schedule, then it is a special meeting. A special meeting, by its definition, is not required to comply with the annual meetings calendar, however notice with an agenda must be posted at the location of the meeting, on the public body’s website if applicable, and at the public body’s principal office, at least 48 hours in advance of the meeting.

**c. Reconvened Meetings.** Reconvened meeting requirements must be followed when a public body meets at its regularly scheduled time and reschedules the meeting to restart within 24 hours. So long as the reconvened meetings is to occur within 24 hours of the convened meeting open to the public, then the public body can declare the date, time, and place of the reconvened meeting without having to post a new public notice. The reconvened meeting agenda must mirror that of the regularly scheduled meeting.

**d. Emergency Meetings.** The first aspect of emergency meetings to keep in mind is that there must be a *bona fide* emergency justifying the meeting. A frivolous excuse for avoiding proper procedure will be scrutinized. With just cause, an emergency meeting may be held without 48 hours advance notice. However, notice must be provided before the emergency meeting to any news medium that has formally requested the annual schedule of meetings.

**2. News Media Notification**

A public body must supply copies of the notices of its regular, special, emergency or rescheduled meetings to any news medium that filed an annual written request for such notice. Also, if a news medium is within the territorial jurisdiction of the public body and has given the public body an address or telephone number, notice of all meetings shall be given to such news medium in the same manner as is given to the members of the body. If a change is made in regular meeting dates, the public body must give at least 10 days notice of such change in a newspaper of general circulation in the area in which the body takes action. If there is a body of local government in a town with less than 500 people and no newspaper is published, then posting notice in 3 prominent places in the governmental unit is sufficient in place of the 10 days notice.

**3. Agenda Requirements**

An agenda must be posted 48 hours in advance at the principal office of the public body, if applicable, and at the location where the meeting will be held. The addition of section 2.02 (c) is meant to end the controversy that surrounded the required amount of detail needed within an agenda. Specifically, though a public body may discuss, debate and deliberate subjects that are not specifically listed on the agenda (the statute’s language that “a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda” makes that clear); the public body may not take final action (i.e. vote) on an issue if it is not listed on the meeting Agenda, and that listing must set forth the “general subject matter” that will be acted upon.

1. **Other posting requirements pertaining to “total compensation” benefits for employers participating in the Illinois Municipal Retirement Fund (IMRF)**

Within 6 business days after an employer participating in the IMRF approves a budget, that employer must post on its website, or if a website is not maintained, at the principal office of the employer, the total compensation package for each employee that has a total compensation package that exceeds $75,000 per year. (The “total compensation” package means payment by the employer to the employee, but not third parties, for salary, health insurance, a housing allowance, a vehicle allowance, a clothing allowance, bonuses, loans, vacation days granted and sick days granted.) At least 6 days prior to approving an employee’s total compensation package that is equal to or in excess of $150,000 per year, the employer must post on its website, or if a website is not maintained, at the principal office of the employer, the total compensation package that is equal to or in excess of $150,000 per year.

**C. WHEN A PUBLIC BODY MAY CLOSE A MEETING OR ENTER INTO EXECUTIVE SESSION.**

All meetings are to be open to the public unless expressly excepted in the list of permissible topics. Section 2(b) sets forth the limited construction of the exceptions. It states that the enumerated exceptions in part 2(c) detract from the overall purpose of the Act in being open, and therefore “the exceptions are to be strictly construed, extending only to subjects clearly within their scope.” Moreover the listed exceptions are merely authorizing closure and are not requirements for holding meetings on such topics in a closed setting. Presently there are thirty-two enumerated exceptions all referring to specific topics that a body may take up in a closed session. Some of them are very specific such as the establishment of reserves or settlement of claims under the Government Tort Immunity Act, while others are more general such as the setting of a price for sale or lease of property owned by the public body. It is important to note that in all circumstances**, no final action may be taken at a closed meeting**. Below is a discussion of some of the more relevant exceptions and those found to be ambiguous.

As a general matter, *any* properly convened meeting of the public body can, if an exception applies for the topic, be moved into a closed session, whether or not it is so listed on the agenda. While it is common for the agendas (as a “courtesy”) to indicate if a closed session is planned at a meeting, that is not required, and the absence of such an indication does not prevent an otherwise proper closed session from being convened.

**1. Purpose**

Although the overall purpose of the Act is to promote openness, the General Assembly realized that certain public body discussions and deliberations would be compromised if prohibited from ever entering into a closed session. Therefore, the Act currently has 32-items listed of topics which were deemed to be proper or appropriate for discussion in a closed meeting.

**2. Permissible Topics**

The first exception, and one of the most commonly used, is “The appointment, employment compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel, including hearing testimony on a complaint lodged against an employee or against legal counsel to determine its validity.” This exception, frequently referred to as the “personnel” exception, allows the discussion of a particular employee of the body or its legal counsel in closed session. It is not however license to discuss in closed session, budgetary or finance issues or concerns arising from such personnel matters.

The second exception is “Collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees.” This exception is somewhat similar to the first, but it allows the discussion of an entire class of employees as opposed to a particular employee under the first exception.

The third exception further broadens the discussion of “personnel” to include “The selection of a person to fill a public office, as defined in the Open Meetings Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.” This exception permits the discussion of filling a position or other such managerial actions for a public body whose responsibility it is to do so.

Another exception is “evidence or testimony presented in open hearing, or in closed hearing specifically authorized by law, to a quasi-adjudicative body, as defined in the Open Meetings Act, provided that the body prepares and makes available for inspection a written decision setting forth its determinative reasoning.” Thus, this exception allows a body to review, in closed session, evidence from an adjudicative body charged by law with the responsibility to conduct hearings and receive testimony.

Section 2(c)(5) allows for a closed meeting in “the purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.” The courts have limited this exception to discussions calculating the exact terms of an offer to purchase a particular piece of real estate, to discuss the seller’s terms, or to consider a plan for acquiring specific real estate. The next exception 2(c)(6) is similar, allowing the “setting of a price for sale or lease of property owned by the body,” but courts have somewhat limited this closed discussion to specific price setting, except in a case from the Appellate Court, Second District, where a lease was involved, and a somewhat broader view of pertinent lease terms involved with the lease in its entirety was allowed.

Section 2(c)(11) states “Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.” Thus, this exception applies to commenced litigation, and presumably, though not clearly stated, such “litigation-like” matters as administrative reviews and arbitrations. For matters that are likely to be litigated in the near future, special note must be made in the minutes of the closed session of the basis for that conclusion, such as receipt of correspondence from an attorney threatening or stating an intent to sue the public body, or perhaps a recommendation from the body’s attorney proposing the filing of a lawsuit on its behalf.

Three other pertinent exceptions are worthy of note here: Section 2(c)(15) “Professional ethics or performance when considered by an advisory body, appointed to advise a licensing or regulatory agency on matters germane to the advisory body’s field of competence,” Section 2(c)(16) which states that “Self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member,” and Section 2(c)(21) “Discussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06.”

**3. Attendees**

All members of the public body involved have a right to attend a closed session. Moreover, anyone the public body invites or allows to attend the closed session is permitted to attend a closed meeting. This usually includes a clerk or whoever is responsible for taking minutes, as well as staff members or the attorney for the public body depending on the particular issues being addressed. Of course no member of the public has a right to be present, unless the public body specifically allows it in order to conduct business on the topic for the closed session.

**4. Procedure for Convening Closed Sessions**

As stated infra, there must be a bona fide reason for holding a closed meeting. In addition, there are specific requirements to initiate a closed session as set forth in Section 2a:

A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, provided each meeting in such series involves the same particular matters and is scheduled to be held within no more than 3 months of the vote. The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting. Nothing in this Section or this Act shall be construed to require that any meeting be closed to the public.

At any open meeting of a public body for which proper notice under this Act has been given, the body may, without additional notice under Section 2.02, hold a closed meeting in accordance with this Act. Only topics specified in the vote to close under this Section may be considered during the closed meeting.

First of all, there must be a quorum present and a majority of that body must vote in an open meeting for the closed session to occur. This vote can be taken in regards to a series of future closed meetings, portions of meetings, or a single meeting so long as each topic justifying the closed meeting is all that is discussed. The voting of each member must be recorded and there also must be a citation to the particular section of the Act authorizing such closed session.

**5. No final action in closed session.**

Section 2(e) says: “No final action may be taken at a closed meeting.” That section goes on to state: “Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.” Therefore, if a body is in closed session and decides that some action is necessary to be taken, then it must proceed to open session to take such final action. When the action is taken in open session, the explanation of that action must be given when the open session commences. For example, if a school board meets in a closed session and deliberates about a new Spanish teacher being hired, then before the final action to hire can be taken, it must go back into an open session. In this open session, the board must explain, either in its motion or the discussion pertaining thereto, the business it is considering before it begins to vote on hiring the new teacher.

**D. RECORD KEEPING REQUIREMENTS: MINUTES**

All public bodies must keep written minutes of all open or closed meetings and a “verbatim record,” usually an audio or video recording, either analog or digital, must be made of all closed meetings. Section 2.06 sets forth the required steps for recording minutes properly, “Minutes shall include, but not be limited to; (1) the date, time and place of the meeting; (2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; (3) a summary of discussion on all matters proposed, deliberated, or decided and a record of any votes taken.”

Meeting minutes of open meetings must be approved within 30 days thereafter or the second subsequent regular meeting, whichever is later. After the public body approves the minutes from an open meeting, they must be presented to the public within 10 days of such approval. Bodies that maintain a website with a full time employee, must also post such minutes on that website within 10 days as well and leave the minutes posted for at least 60 days after the initial posting. The “verbatim record” from a closed meeting must be preserved for a minimum of 18 months from the time of the recorded meeting. Then, it may be destroyed if the public body approves the destruction of the particular meeting recording, and the public body approves the minutes of the closed meeting that meet the written minutes requirements set forth above.

Best practice is to develop a form for closed session meeting minutes which can also serve as a checklist or reminder of the required steps, where if each blank is completed with the respective information, compliance with the requirements of the Act will be achieved. Moreover the examples listed from the Act can be listed on that form, for going into closed sessions and thereby function as a ready reference or citation for completing the motion and stating the reason for the closed session. (See the exhibit attached at the end of this article.)

**1. Voting Records.**

A record of any vote taken must be recorded in the meeting minutes. Further, the vote of each member for or against a closed meeting, and a citation to the Act authorizing such closed meeting must be publicly disclosed, recorded, and entered into the minutes at the time of the vote. It is often said that no voting can be done in a closed session, though that is not actually correct. Since under the statute a “record of any vote taken” must be made in the meeting minutes, including closed session minutes, there is the clear implication that voting may occur in a closed session. However, since “no final action” may be taken in closed session, and a vote on such “final action” must be in public, many advisors or board members interpret this (somewhat incorrectly) as no voting can be done in closed session at all.

The Attorney General has opined that no secret balloting is ever permitted under the Act. Regardless of the precise method for any “secret ballots” i.e. paper submittal, electronic tablet, even whispering, the Attorney General’s view is that the public must be able to associate each vote cast with the individual official who did it. Therefore that “failure to associate” is a prohibited secret balloting however it is specifically done.

**2. Semi-annual Review of Executive Session Minutes.**

Each body must periodically, but no less than semi-annually, review all closed meeting minutes. Usually, this task is delegated for the initial review work to a committee, an individual board member, staff member or even the attorney, to review and prepare a memo reporting on their review and recommending action of some type. At this periodic review, “a determination shall be made, and reported in open session that (1) the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available for public inspection.” The Act provides a grace period of 60 days from the discovery of its failure for the body to comply with the semi-annual review requirement. The Act does not require the release of closed session minutes, it requires the semi-annual review, which in turn may or may not lead to a release.

**E. PUBLIC ATTENDANCE, RECORDINGS OF MEETINGS AND PUBLIC COMMENT**

All open meetings are to be held at times and places which are “convenient and open” to the public. The public bodies may not hold a meeting on a legal holiday unless the regularly scheduled meeting day falls on that holiday. The purpose of this requirement is to prohibit secret deliberation. Courts have held that the size and location of the meeting place must accommodate the expected public attendees. If a meeting is held in an inconvenient setting, it may violate the Act. Therefore, it is best to overestimate attendance when planning an open meeting.

Section 2.05 governs the recording of meetings and stipulates “any person may record the proceedings at meetings required to be open by this Act by tape, film, or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings.” But such rules cannot be so oppressive, restrictive, or unreasonable as to deprive the public of their right to record the open meeting. However, if a witness refuses to testify on the grounds that he doesn’t want his testimony to be broadcast, then the authority holding the meeting can prohibit recording during the testimony of that witness.

The Act requires that any person must be given an opportunity to address the public body in what is usually referred to as the “public comment” period of the meeting. Since the statute says the public comment opportunity is to be “under the rules established and recorded by the public body,” it is imperative that each and every body promulgate such reasonable rules to apply. Best practice is to prepare and adopt the rules that can be used to provide for and reasonably regulate such public comment. The Attorney General has written or stated several specific opinions as to the details of such permitted rules. For instance in the Attorney General’s opinion no person can be mandated to give their address or other identifying information to the public body in order to be given an opportunity for public comment. No rules like pre-registration days in advance or description of topic of comments can be used to “chill” the public’s First Amendment rights to speak. Reasonable “time, place and manner” rules for public comment periods should be acceptable, but not content based rules. Presumably the rules may permit the request for information like addresses, phone numbers, topics, but the Attorney General’s position is that none of these may be used as “requirements” or mandatory information. Moreover, the Attorney General has the opinion that the opportunity for public comment must be afforded at each and every meeting of any kind of a public body including committee meetings.

**F. REQUIRED TRAINING FOR MEMBERS OF PUBLIC BODIES.**

The Act establishes that “[e]very public body shall designate employees, officers, or members to receive training” on the Open Meetings Act. The names of those designated must be submitted to the Public Access Counselor (“PAC”), and they must “successfully complete” an electronic curriculum designed and administered by the PAC (available at: http://foia.ilattorneygeneral.net/) Once certified, those individuals must then complete annual training programs. Any new members added to the designated list, must successfully complete the certification within 30 days of their addition.

Additionally, *each elected or appointed member of a public body* must complete the on-line training within 90 days after the date the member takes the oath of office or assumes responsibilities as a member of the public body. The electronic training certificate must be filed with the public body. The training must be successfully completed once during each term of office. Under the Act, a failure to do this training is not a criminal violation of the Act and does not invalidate the actions of the public body which occur while this person is serving. School Board members are exempt if they have participated in training under Article 23 of the School Code, and similar select alternate trainings are provided for the Drainage commissioners, soil and water conservationists, and park district and forest preserve and conservation district members.

**G. THE ROLE OF THE PUBLIC ACCESS COUNSELOR (PAC) WITHIN THE OFFICE OF THE ILLINOIS ATTORNEY GENERAL.**

If any person believes there has been a violation of the Open Meetings Act, that person has 60 days to file a Request for Review to the PAC. The request must be in writing, signed by the requester, and include a summary of the facts. If the PAC determines further action is warranted the PAC shall forward a copy of the request to the public body within 7 working days and specify the records to be furnished. Within 7 working days after receipt of the request, the public body shall provide copies of the records. If the public body fails to comply, or if otherwise necessary, the Attorney General may issue subpoenas to anyone having knowledge of the violation. **When conducting a review, the PAC has the right to examine the “verbatim recording” of a meeting closed to the public or minutes of a closed meeting as does a court.**

After receiving a copy of a request for review and production of records, a public body may answer the allegations in the form of a letter, brief, or memorandum. The PAC shall then forward a copy of the answer or redacted answer to the requester. A requester or public body may furnish affidavits and records concerning any matter germane to the review.

Within 60 days of the request, the PAC will issue a binding opinion. If the parties disagree with the opinion, that binding opinion is subject to administrative review through the Court system. Importantly, all the public records that have been provided to the PAC during its review process are exempt from disclosure under FOIA while in the possession of the PAC. In situations where the public body is unclear as to the proper procedure, the PAC may issue advisory opinions, and any good faith reliance on such opinion relieves any liability by the public body under the Open Meetings Act.

When responding to any written request, the AG may resolve the matter through mediation or by a means other than issuing a binding order. The decision to not issue a binding order is not reviewable. If a binding order concludes a violation has occurred, the public body shall either comply as soon as practical or initiate administrative review. If no violation is found, the requester may seek administrative review. If the requester files a civil suit with respect to the same alleged violation of Open Meetings Act, then the PAC shall be notified by requester and PAC shall take no further review action and must notify the public body.

The AG may issue advisory opinions to public bodies regarding compliance with the Open Meetings Act. A written request for review may be initiated by the public body or its attorney and must contain specific facts. The PAC can request additional information. If a public body relies in good faith on the advisory opinion, then it is not liable for penalties under the Open Meetings Act, so long as the facts have been fully and fairly disclosed to the PAC.

Any binding opinions issued by the AG shall be considered a final decision of the administrative agency, and advisory opinions issued to a public body shall not be considered a final decision of the AG. All actions for administrative review of binding opinions must be commenced in Cook or Sangamon Counties.

**H.** **EFFECTS OF NON-COMPLIANCE**

Section 3 outlines the enforcement measures upon non-compliance with the Act’s provisions. Where the Act’s provisions are not followed or there is probable cause to believe that the provisions of the Act will not be complied with, any person may either contact the PAC to investigate and issue a binding opinion or they may bring a civil action within 60 days in the circuit court in the jurisdiction where the violation has or is expected to occur. Wherever the action is filed, the public body will be forced to turn over information to the fact finder if the information is necessary – including the recorded minutes of either open or closed sessions. The Act has a number of enforcement and penalization options upon a successful suit for a violation of its provisions. An offending public body could be ordered to hold an open meeting, subjected to an injunction against future violations of the Act, ordered to make public the portions of the minutes that are not to be kept confidential, or have its actions declared null and void if their final actions taken violated the Act. In addition to these remedies, in extreme circumstances, the State’s Attorney may charge violators with a Class C Criminal Misdemeanor (5 ILCS 120/4).

**CONCLUSION**

The Open Meetings Act is a pervasive set of rules for the operation of all public bodies where it applies, and specifically as to the conduct of their meetings, whether open or closed. It can be a trap for the unwary, and it is frequently being amended by the Legislature, interpreted by the Attorney General and, construed by the courts, so it presents an ever changing landscape. While the penalties can be severe, the potential criminal penalties are actually seldom used. Instead, there are numerous examples of alleged violations, which because of the high public profile, are at least embarrassing if not actually damaging and costly to the public body, its members and employees. Great care should be taken in compliance efforts to stay abreast of developments so the business of the body and the public it serves is successfully conducted.

**MINUTES OF CLOSED MEETING**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ LIBRARY**

**DATE: TIME:**

**PLACE OF MEETING:**

**MEMBERS PRESENT: MEMBERS ABSENT:**

**VOTE ON CLOSING: MEMBERS AYE:**

**MEMBERS NAY:**

**NON-MEMBERS IN ATTENDANCE:**

**APPLICABLE STATUTORY SECTION:**

[See reverse for numbers, include any applicable ones] \_\_\_\_\_\_\_\_\_

**SUBJECT MATTER DISCUSSED:**

[Description of all matters proposed, discussed or decided]

**RECORD OF ANY VOTE TAKEN:** [No final action may be taken in closed session]

Specify movants and record tallies:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Secretary

**EXCEPTIONS PERMITTING CLOSED SESSIONS:\***

**Citation to**

**Section**

2(c)(1) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel, including hearing testimony on a complaint lodged against an employee or against legal counsel to determine its validity.

2(c)(2) Collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees.

2(c)(3) The selection of a person to fill a public office, as defined in the Open Meetings Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.

2(c)(4) Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in the Open Meetings Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.

2(c)(5) The purchase or lease of real property for the use of the public body.

2(c)(6) The setting of a price for sale or lease of property owned by the public body.

2(c)(7) The sale or purchase of securities, investments, or investment contracts.

2(c)(8) Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff the public or public property.

2(c)(11) Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

2(c)(12) The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or the review or discussion of claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the public body or any intergovernmental risk management association or self insurance pool of which the public body is a member.

2(c)(15) Professional ethics or performance when considered by an advisory body, appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence.

2(c)(16) Self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member.

2(c)(21) Discussion of minutes of meetings lawfully closed under the Open Meetings Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06 of the Open Meetings Act.

\* The exceptions listed are those applicable to public libraries in the words of the statute. Other exceptions may apply to other forms of governmental bodies. Although stricken by statutory amendment, we believe a constitutional exception continues to exist permitting closed session to consult with an attorney on privileged matters.

1. Beginning January 1, 2015, local governments have an additional requirement involving email, not actually arising from the Open Meetings Act, but from the Local Records Act (P.A. 98-0930) if they have a website. Within 90 days, on the home page of their website, there must be an email address where members of the public can contact board members. If individual board members email addresses, either personal or official, are listed there, that may be used for compliance but it is not required. [↑](#footnote-ref-1)